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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1160

RANDOLPH PHILLIPS,

Petitioner,

v.

SECURITIES and EXCHANGE COMMISSION and THE UNITED CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,
Pro Se

JULIEN CORNELL,
Of Counsel

April 13, 1946

APPEAL PRINTING CO., INC., 120 CEDAR ST., NEW YORK, WO 2-3242

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Randolph Phillips respectfully prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit rendered in this cause on January 31, 1946 (R. Part IV, XII), which decree affirmed certain orders of the Securities and Exchange Commission (R. Part II, 61 and 62 of 3a) approving a plan of reorganization filed under Section 11 (e) of the Public Utility Holding Company Act of 1935.

Opinions Below

The findings, opinion and order of the Securities and Exchange Commission are set forth in Holding Company

Act Release No. 5440 (R. Part II, 3a). The opinion of the Circuit Court of Appeals (R. Part IV) is reported in 153 F. (2d) 27.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on January 31, 1946 (R. Part IV, XII). The jurisdiction of this Court is invoked under Section 24 (a) of the Public Utility Holding Company Act.

Questions Presented

1. Does the Securities and Exchange Commission have the power under Section 11 (e) of the Public Utility Holding Company Act to override the laws of a State respecting corporate liquidations and reorganizations without first obtaining the approval and enforcement of its overriding order by a District Court?

2. In view of the fact that (1) the evidence was uncontroverted that the management of The United Corporation has been able to perpetuate itself in office by requiring that only 25 per cent of the voting stock was necessary to make a quorum for the election of directors, and (2) that the management had never received the vote of a majority of the voting stock for its election at any time in the preceding six years, and (3) that 18,000 stockholders voting together were unable to seat a single director because the vote was counted non-cumulatively; and in view of the fact that the Commission is directed under Section 11 (b) (2) of the Act to require that a registered holding company take steps to ensure that voting power is fairly and equitably distributed "as soon as practicable after January 1, 1938" and in view of the fact that the Commission has the power under Section 11 (e) to modify any plan filed thereunder

so as to meet the standards of Section 11 (b) (2), did the Commission err in denying amendments to a plan of reorganization which would effect such a distribution of voting power where such denial was based solely on the ground that the amendments were not "germane" to the plan as proposed by the company's management and as filed under Section 11 (e) of the Act?

Statute Involved

The relevant portions of Section 11 of the Public Utility Holding Company Act are:

> "SIMPLIFICATION OF HOLDING COMPANY SYSTEMS
> SEC. 11 * * *
>
> (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> * * * * *
>
> (2) To require, by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding company system does not unduly or unnecessarily complicate the structure, or unfairly and inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company.

Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in Section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the

court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such dispostion in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of

such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

* * * * * * *

Statement

Petitioner is the owner of 1100 shares of Common Stock and the attorney-in-fact for 18,426 stockholders owning 1,807,436 shares of the Preferred and Common stock of The United Corporation. His powers as attorney-in-fact derive from proxies executed by the said stockholders for use at the Annual Meeting of the Corporation in 1944, which proxies are not to be used to represent any stockholder in any proceeding in any court, but were given on the express understanding that petitioner himself would proceed in the courts, if necessary, to protect the interests of himself and other stockholders (R. Part II, p. 29a).

(a) Background of the Orders

The United Corporation is a public utility holding company and is incorporated under the laws of the State of Delaware. Its capital structure is free of debt and con-

sists exclusively of two classes of stock, Preferred and Common. By its order of August 14, 1943 the Securities and Exchange Commission directed United to reduce these two classes to one class of stock, namely Common. *In the Matter of The United Corporation,* Holding Co. Act Release No. 4478. Petitioner at no time has complained of this order. The assets of United consist almost exclusively of stocks in public utility holding companies and the 1943 order also required United to cease to be a holding company. This direction at no time has been the subject of petitioner's complaint. Petitioner's objections are directed at the methods by which United at the Commission's direction has sought to comply with the 1943 order.

United refused to register with the Commission under the Act until March 28, 1938, previously contending for two and a half years that the Act was unconstitutional. At no time from 1938 to 1944 did it take or propose to take any steps that the Commission considered to be an effective compliance with the terms of Section 11 (b) (2) of the Act, the section commonly known as the corporate simplification section of the statute. As a result of this long period of non-compliance, Petitioner in February 1943 and 1944 instituted contests for proxies in an effort to oust the incumbent management of the Company (See R. Part II, pp. 23-25a, for a brief summary of the contests). Some 14 to 18,000 stockholders gave Petitioner their proxies but Petitioner's efforts were unsuccessful and the management was reelected to office. Prior to the first contest the management had proposed to the Commission that it be allowed to effect a certain Plan of compliance with the Act, which Plan was disapproved by the Commission in its Findings and Opinion accompanying the order of August 14, 1943. During the course of the proceedings, however, the Company made clear at the insistence of

Counsel for the Commission that it proposed its Plan be subject to the approval not only of holders of a majority in number of all its outstanding stocks but of a majority in number of each class of stock. (*Id.*, footnote 124 at p. 51.) The Commission itself in its opinion stated that the change of business proposed by the management of United (from that of a public utility holding company to that of an investment company) would "devote the funds which security holders have invested to a purpose different from that for which they were contributed" and "no such program would be fair which does not require majority approval either of the present preferred and common stock voting by classes, or of the new common stock, should United choose to recapitalize on a one-stock basis before seeking stockholder approval of the proposed new venture" (*Id.*, p. 51-2).

The Commission in its opinion accompanying the orders under review in the present case now contends however, that it "did not suggest, nor had we any intention of suggesting, that a program for eliminating preferred stock and for divestment of assets unretainable under the Act should be the subject of a stockholders' vote" (R. Part II, p. 33). This 1944 interpretation by the Commission should be compared with that of the Company's directors in their first communication to the stockholders after the 1943 order and opinion had been issued in which they stated:

> "After careful consideration, the Board of Directors has concluded not to seek a review of the Commission's decision. * * * Since the disposition of a major part of the securities of the statutory subsidiaries appears in all events to be necessary, it is probable that a first step of compliance will be a proposal for the exchange of some of these securities

for outstanding shares of the Corporation's Preference Stock. Although questions still pending with respect to certain of the Corporation's statutory subsidiaries create very real difficulties, it is hoped that such proposals may be reduced to concrete form for early submission to the Securities and Exchange Commission. *Any such plan will also be subject to approval by stockholders.*" (Emphasis supplied.) (R. Part II, pp. 18-20a.)

This letter was dated September 13, 1943, a month after the Commission's opinion. It shows that the Company's directors understood that principles of equity and law, if not the language of the Commission's opinion, required a vote of stockholders on a "program for eliminating preferred stock and for divestment of assets unretainable under the Act." That the language of the Commission's opinion was understood in the same way by the Commission as by the Company is clear from a brief analysis. The Company could either sell its utility stocks and hold the proceeds for non-utility investment or distribute the stocks or the proceeds from their sale to its stockholders. That is, instead of a distribution to stockholders the Company could use the proceeds of a sale for use as would a non-public utility investment company. That was the only issue to be decided by a vote. The Commission now suggests however that its intention was to require a vote only *after* divestment and elimination of the Preference Stock.

First, it is obvious that the Preference Stockholders could not vote on a program of dissolution versus transformation into an investment company if the Preference Stock had been eliminated from the Company. But the Commission said, furthermore, that if the vote were not had by the "present preferred and common stock" it

should be made by "the new common stock" after recapitalization on a one-stock basis. The last quoted words are omitted from the Commission's latest opinion. For it is obvious that a recapitalization could not take place without the voluntary approval by vote of both classes of stockholders or enforcement of an order of reorganization by a United States District Court under Section 11 (d) or (e) of the Act.

We think it is clear therefore that the Commission suggested and intended in its 1943 opinion as a matter of equity and law to require a vote by the stockholders on any program for compliance with its order of August 14, 1943 or an order by a District Court under Section 11, and that the Commission knew in the absence of such a vote it could enforce the required result by resort to an order of a District Court. That this was likewise the Company's view is the only interpretation consistent with the letter of September 13, 1943, above quoted. After the letter's issuance the Company filed a preliminary plan with the Commission similar in effect to the Plan approved by the orders herein complained of, and this plan included a provision making it subject to stockholders' approval.

(b) The Plan

The Plan which the management of United filed with the Commission proposed that certain of the Company's assets* be offered in exchange for 45 per cent of the Company's Preference Stock. As finally approved by the Commission the assets in question had a cash or market value, as of June 30, 1944, of approximately 46 million dollars, and represented roughly 38 per cent of the Com-

* Common Stock of the Philadelphia Electric Company and cash.

pany's total assets. In a memorandum submitted to the Circuit Court, counsel for the Commission stated:

> "The Commission treated the [Company's] proposal as in effect a plan of reorganization * * *"
>
> "* * * any attempt to dispose of a major proportion of (applicant's) assets and to discharge a substantial proportion of its outstanding Preference Stock liability amounts in substance to a reorganization and calls for application of reorganization standards of fairness."

Article 10 of the Certificate of Incorporation of The United Corporation contains the following provision regarding reorganization which is pursuant to Section 5 (9) of the General Corporation Law of Delaware:

> "If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the Court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation."

It is clear from the above that the management of United has no power, except with the requisite stockholder approval, to offer and effect the Plan which is the subject of the orders herein challenged. The Commission, however, found that it was not a Plan requiring stockholder approval under Delaware law because "it

differs *only in form* from that of repurchasing outstanding shares of Preference Stock with cash derived from a sale" of the stocks offered in exchange for the Preference Stock. Petitioner replied that the short answer to this argument is that every reorganization involving an exchange of securities is a purchase of outstanding securities with the assets left in the company. Were such reasoning to prevail the Delaware statute could be subverted in every reorganization made in which Preference Stock or any other security was reorganized. It is well understood that the courts will look to the substance of a transaction and not be deflected by its form. The Circuit Court, however, did not decide this point. The chief and only other support for dispensing with stockholder approval was the Commission's finding that "the requirements of the Act must be met whether or not the stockholders approve. In this respect the Act supersedes State law." Petitioner has never disputed that the requirements of the Act must be met regardless of stockholder approval. The Act specifies, however, a protective procedure which must be followed by the Commission before it can override the requirements of State law; namely, the application by the Commission to a District Court for an order under Section 11 (d) or (e). Petitioner's complaint is that the Commission disregarded both State law and the Act which it is entrusted with administering.

It should also be noted that not only was the Plan of United a reorganization but it was a step in dissolution or liquidation. For, as the Commission's decision recites (R. Part II, p. 3a and pp. 22-23 thereof), "it is the considered judgment of the management that the most feasible method for compliance (with the 1943 order) is to offer further exchanges of portfolio assets for outstanding shares of United's Preference Stock." Under the

Plan herein challenged 45 per cent of the Preference Stock has been exchanged for 38 per cent of the corporation's assets on the basis of June 30, 1944 market values. At this ratio of exchange it will take 84 per cent of United's assets to retire 100 per cent of its Preference Stock. A corporation that is no more than 16 per cent of its original size has been substantially dissolved. However, the Commission has prohibited the existence of even this stump of a corporation as a holding company and it has stated that it would "withhold" issuance of a dissolution order pending on whether or not a majority of United's stockholders vote to continue it in a different business.* Since the management of this corporation has not obtained such a vote more than two years after the Commission's order of August 14, 1943 has been in effect, the only permissible inference from the present record is that the company will be wholly dissolved. Section 39 of the General Corporation Law of Delaware requires for dissolution the consent of two-thirds in interest of the stockholders having voting power. The statute obviously requires that the question of dissolution be acted upon by the stockholders prior to any irrevocable act in that direction and not after a dissolution has been substantially achieved. It may well be the desire of the stockholders that instead of the present plan or similar plans a one-stock recapitalization be effected and the corporation then be dissolved or that the stocks of the public utility companies be sold and no dissolution take place. Certainly the stockholders' right to determine these questions and especially the question of dissolution will be seriously prejudiced and almost entirely foreclosed by execution without their consent of such plans

* *In the Matter of The United Corporation*, Holding Co. Act Release No. 4478, at page 50.

as that herein reviewed. That the Commission has come round to petitioner's view on this point is made clear by a decision, issued five months after the decision in the present case:

> "The present plan is but a further step in the process of bringing the Northern States system into compliance with that section (11), and these steps must be viewed together. Clearly the Delaware preferred stockholders may not do in two steps what they could not do in one—, namely use Section 11 as a means of depriving the common stock of whatever legitimate investment value it might have in the enterprise absent the readjustments required by Section 11."
>
> *In the Matter of Northern States Power Co.*, Holding Co. Act Release No. 5745.

Petitioner contends that the entire plan or program must be submitted and no such action by the Commission, absent the confirmation of the courts, as was embodied in the orders herein under review can substitute for or override the requirements of the Delaware statute. Again it should be emphasized that petitioner does not dispute that the Commission either on its own motion under Section 11 (d) or at the Company's request under 11 (e) may seek from a District Court and obtain therefrom an order effecting the Plan without a stockholders vote.

(c) Elimination of Vote Provision

At the hearings before the Commission the following additional facts bearing on this issue were brought out:

The Commission's former employee, William M. Hickey, became president of United following the proxy contest of 1943. Although the management won that con-

test, the incumbent president George H. Howard resigned one month later to be followed into office by Hickey, who previously had left the Commission to go into business himself as a public utility consultant.* We quote from the record in the present proceedings:

"By Mr. Phillips:

Q. Now, will you tell us what your chief activities were since your election as president of The United Corporation prior to the issuance of the Securities and Exchange Commission decision in the present proceedings? A. (By Mr. Hickey) My chief activities—

Q. (Interrupting) With respect to The United Corporation. A. (Continuing) were to study the assets of the company and what might be done with them, and the recommendations of the staff of the SEC, and how the company might be able to work out its destiny, and I came to the conclusion that the way that it could best do it would be to try to cooperate with the Securities and Exchange Commission, particularly in view of their decision in the UGI case and in the United Light & Power case.

Q. Which came down when? A. The United Light & Power case came down—well, roughly a year ago.

Q. Just about the time you became president? A. Generally, yes. And the UGI decision, I believe, had come down just before that. And to see if we could not get an order out of the Commission that we could work under—and then commence to obtain results under that order both with respect to The United Corporation itself and with respect to the statutory subsidiaries, and then having arrived at that conclusion I had a number of con-

* Hickey is the second employee of the Commission to become an officer of United, the Commission's former general counsel, John J. Burns, resigning that post to become counsel to United some years earlier. A third former Commission employee is assistant to the president of United.

versations with members of the Securities and Exchange Commission.—

Q. (Interrupting) Do you mean the Commissioners or the employees of the Commission? A. Both.

Q. Both? A. And I believe those discussions led up to the issuance of the particular order that was issued on August 14, 1943. * * *

Q. Will you explain that remark? A. I mean by that I told what I believed could be done and should be done, and in view of those circumstances that that had quite a bearing on the particular order that was issued at that time.

Q. What reason do you have to know that that had a bearing so far as the Commission was concerned in that order." (R. Part II, pp. 6-7a)

At this point counsel for the applicant objected and the Trial Examiner cut off any further questioning along this line. First it should be noted that Mr. Hickey became president in April 1943 and that the public hearings leading up to the order of August 14, 1943 were closed on June 18, 1942 and oral argument on the issues, after filing of the briefs, was heard on October 8, 1942 (Page 3, *In the Matter of The United Corporation,* Holding Company Act Release No. 4478). But despite the public closing of the hearings Mr. Hickey was able, according to his unrebutted testimony, to walk into the offices of the judges, the commissioners, and discuss the issues and subsequently to state that these private discussions led up to the issuance of the particular order in question.* But

* The record discloses that the content of petitioner's private correspondence with the staff of the Commission relating to his proxy statements was revealed by unnamed members of the staff to Mr. Hickey. (R. Part II, pp. 10-11a) Rule X-14A-4 of Regulation X-14 under the Securities Exchange Act of 1934 provides that preliminary copies of proxy statements filed with the Commission "shall be for the information of the Commission only". Yet Mr. Hickey by his own testimony was able to induce a breach of confidence by members of the staff with respect to petitioner's preliminary copies and the correspondence thereon. This is a clear violation of Section 24(c) of the Securities Exchange Act.

although the Commissioners do not challenge this part of the record they do allege that the only conversations held between Mr. Hickey and anybody connected with the Commission with respect to the issues herein reviewed were with members of the Commission's "staff". They also convey the impression that the Commission "concurred" with the advice of the staff *after* instead of before the public hearings. The record, however, shows as follows:

> (1) On January 27, 1944 United formally filed with the Commission its application for approval of the Plan. An earlier draft of the Plan had been discussed with the Commission. This draft provided that the Plan be subject to stockohlders' approval but the provision for the stockholders' vote was deleted after conversations with the staff of the Commission (R. Part II, p. 10a).
>
> (2) This was done after Commissioner Robert O'Brien stated to counsel for The United Corporation that "he (Commissioner O'Brien) considered submitting the plan to a vote of stockholders to be inappropriate because the plan being submitted as a step in compliance with the order of August 14 was not subject to stockholder approval". (R. Part II, p. 40a). This statement by counsel was made, it should be noted before the start of public hearings by the Commission on the plan. At United's annual meeting prior to the hearings, Mr. Hickey confirmed Mr. Smith's statment as follows:
>
> > "I should like to add for the record, to confirm what Mr. Smith has just said, that Commissioner O'Brien also indicated to me that a vote would be inappropriate and that our plan should not provide for a vote; and that in addition to Commissioner O'Brien, other responsible representatives, whom I am willing to name if anyone wants me to name them, made the same point, and, in fact, stressed the point to me." (R. Part II, p. 42a)

Earlier, at the first session of the Annual Meeting of United's stockholders, held on March 1, 1944 (almost two months before the public hearings on the issue), Mr. Hickey stated:

> "The S.E.C. has advised us that they consider it an appropriate first step in compliance with their order of last August. Of course, they still have to go through the hearings there and determine that it is fair and equitable and then issue a report on it, but they consider that this is an appropriate first step. A step of this type is appropriate to meet their order. Hearings are going to commence later this month * * *
>
> "Now, it was originally planned when we discussed this last September and worked it out that we were going to submit it to our stockholders for their approval. Then we had a number of discussions with the Securities and Exchange Commission, *the members of the Commission* and members of the staff, and they indicated to us that in their opinion such a plan, since it would be in compliance with the order of theirs under Section 11 which we would have to comply with, that such approval would be unnecessary and undesirable. *They were so insistent on this point* that we took that provision out of the plan as it was actually filed." (R. Part II, p. 37-8a.) (Emphasis supplied.) * * *
>
> "The Chairman (Mr. Hickey) Will you go up to the counsel of the Securities and Exchange Commission and ask them what they think of me?
>
> "Mr. Miller: I don't have to go up.
>
> "Mr. Phillips: Mr. Hickey has asked Mr. Miller to go to the Securities and Exchange Commission and ask them what they think of him. What do you think they think of you, Mr. Hickey?
>
> "The Chairman: From what I know, they have always been very friendly, and the last time I saw Judge Healy he was very complimentary and told

> me what a great job he thought I was doing, and the last time I saw Bob O'Brien he told me he thought I was doing just the right thing and didn't see how I could do anything else in the way I was handling the business of the company." (R. Part II, p. 39a.)

This is then what the unrebutted evidence shows as to what actually took place between the Company and the Commission in the midst of proxy contests and prior to the public hearings on the Plan. These facts do not bear out the impression of the Commission's decision that the members of the Commission "concurred" with the advice of the "staff" *after* the public hearings. They adjudicated the issue before the hearings, and they so far stepped out of their roles as judicial and impartial administrators as to intervene in the 1944 proxy contest between the management and its opponents.

On September 13, 1943, as above noted, the Company wrote all the stockholders that its plan would be subject to their approval. In January 1944 the plan was formally filed with the Commission after deletion of the provision for the stockholders' vote. Thereupon the management issued its routine appeal for proxies for the annual meeting to be held in March, 1944 and at the same time notified the stockholders of the filing of its plan. (R. Part II, pp. 33-37a). *But no mention was made of the omission of the vote provision.* The Commission allowed this solicitation of votes for re-election of the management to be made without forcing a revelation of the change in the plan and thereby allowed the stockholders to believe that the promise of the September 13th letter still held. Had it not been for Petitioner's action in sending out a proxy appeal on February 12, 1944 (R. Part II, p. 26a) the stockholders would not have learned of the revocation of the promise until after

the directors' re-election and the formal offering of the plan. The Commission, however, permitted the management of United to answer Petitioner's disclosures once the secret came out as follows:

> "It is true that your Board of Directors at first contemplated that a plan would be subject to approval of the stockholders. Thereafter responsible representatives of the Securities and Exchange Commission indicated to us that such a submission would be inappropriate, because the plan of exchange, if approved by the Commission, will be a step taken to comply with the order which the Commission made on August 14, 1943." (R. Part II, p. 35a.)

At the Annual Meeting of the stockholders United's counsel revealed that the letter above quoted was submitted, *prior to publication,* to "the full Commission" which allowed it to go out without objection or exception by any member of the Commission (R. Part II, page 41a).

The above record demonstrates how inaccurate is the following summary in the Commission's opinion:

> "The record indicates that the provision for a stockholders' vote was omitted on the advice of our staff, whose duty it is to advise applicants regarding the requirements of the Act in the light of precedents, including our published opinions and such judicial decisions as may be relevant." (R. Part II, footnote at p. 33 of p. 3a.)

Not only is the record incorrectly summarized but there are no published opinions of the Commission on the point at issue and we say this despite the citations in its decision. We agree that "advice to applicants regarding the *requirements* of the Act" are proper by the "staff". In the present case the Commission knew there had been a proxy fight and that the management's plans would in

all likelihood be contested, and there are no requirements that forbid a vote, as the Commission admitted:

> "Of course there are often alternative methods from which to choose, and it is not necessarily inappropriate to submit to stockholders the particular method chosen by the management * * * (R. Part II, p. 33 of p. 3a.) Although a stockholders' vote is not unheard of in a case of this kind (see *National Power & Light Co.*, 10 S.E.C. 827 (1941)), we are satisfied that there is no necessity for it * * * (R. Part II, footnote of p. 33 of p. 3a.)."

Petitioner objected to the Commission making the findings that there was "no necessity" and "inappropriate" in advance of public hearings and presentation of the evidence and Petitioner's views, for here was a question involving equitable as well as legal considerations. Administrators who have committed themselves to findings and allowed them to be publicized in advance of hearings may find themselves psychologically incapable of giving that fair and impartial consideration to a contrary argument that they would have possessed had they not committed themselves to the opposite position.

> "A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide."
>
> (Speaking of the creation of independent hearing commissioners): "A similar result can be achieved at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them."

> (Speaking of delegating authority to make preliminary determinations to appropriate officers): "Where this is done, no question can arise that the ultimate deciding officers have been biased through having made, ex parte, a preliminary determination in a case which they have later to decide." (Page 56, *Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure Appointed by the Attorney General;* 77th Congress, 1st Session, Senate Document No. 3; 1941.)

In the present case not only did the staff *and* the Commissioners decide in advance of public hearings that a stockholders' vote would be "unnecessary" and "inappropriate" but they intervened in the proxy contest between the management and its opposition to the extent of forcing publication of their *ex parte* advance decision in order to extenuate the management's undisclosed change of position.

The Circuit Court minimized the prejudicial actions of the Commissioners in adjudicating *ex parte* prior to the public hearings one of the most crucial issues. It describes these actions as "no more than legitimate prehearing conferences" and refers to a report of the Attorney General's Committee. That report, however, at page 41 spoke of assistance in preliminary discussions so that "the facts presented" and the "factual issues" would be clearly delineated in most economic fashion. It did not approve of deciding issues of law or contested facts or questions of equity at these conferences, and as above noted the Attorney General's Committee forcibly came out against such a procedure.

The Commission at page 61 of its decision some months later in the *Commonwealth & Southern* case

(Holding Co. Act Release No. 5825) stated: "It (the staff) was careful to point out that as far as the Commission itself was concerned no expression of opinion could be made * * *." Petitioner does not raise here the question of whether the pre-hearing actions of the Commission deprived him of a fair and impartial hearing on this issue, but has merely set forth this background at some length so this Court may have before it the facts out of which the questions presented here emerged.

Reasons for Granting the Writ

1. This is the first case to present the question of whether the Securities and Exchange Commission has the power to short-cut the protective provisions of both the Public Utility Holding Company Act of 1935 and the statutes of the State of incorporation by directing a registered company to effect a plan of reorganization without first obtaining the approval of a District Court or of the affected stockholders as provided in the State law. The Circuit Court held that the provision in Section 24 (a) of the Act for review *by a Circuit Court* of an SEC order under the Act is "adequate protection" to dissenters, but this overlooks the crucial distinction that enforcement proceedings in a District Court under Section 11 of the Act were designed by Congress to confer upon dissenters the following rights:

> (i) The right to propose in the District Court an alternative plan to the company's plan. No such alternative plan can be proposed or considered in the Circuit Court on direct review of an SEC order.
>
> (ii) An automatic stay pending review by the District Court of the SEC order. The review provided by Section 24 of an SEC order in the Circuit

Court does not include the right to such a stay, which is made discretionary with the Circuit Court.

(iii) A right to a trial *de novo* of all issues respecting the fairness and equity of the plan approved by the Commission.

Should the construction of the Act urged by the Commission and upheld by the Circuit Court be allowed to stand, the rights of dissenters which Congress legislated to protect will be abruptly changed. The present interpretation increases the powers of management by destroying the safeguards of State law requiring a vote by stockholders before a reorganization plan may be effected. At the same time that these safeguards are destroyed the safeguard of a trial *de novo* by a District Court is also eliminated, while no opportunity at all will remain for stockholders to propose a plan of their own in view of the fact that the SEC proceedings under Section 11 (e) are restricted to hearings on the management's plan.*

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* The position of the SEC in this case represents a novelty and a reversal of its position in similar cases. This is believed to be the first time it has endeavored to effect a plan of reorganization without requiring, *when requested*, a stockholders vote or a District Court proceeding. See *Great Lakes Utilities Company*, Holding Co. Act Release No. 3419, plan enforced E. D. Pa., Apr. 21, 1942, unreported; *In re Columbia Oil & Gasoline Corp.*, 50 F. Supp. 965 (D. Del., 1943); *In the Matter of Commonwealth & Southern Corp.*, Holding Co. Act Release No. 5825; *In the Matter of The United Corporation*, Holding Co. Act Release No. 4478; *International Utilities Corporation*, Holding Co. Act Release No. 4896 and 4992; plan enforced without opinion S. D. N. Y., 1944; *Jacksonville Gas Company*, 46 F. Supp. 852 (S. D. Fla., 1942); *National Power & Light Company*, 10 SEC 827 (1941); *Puget Sound Power & Light Co.*, Holding Co. Act Release No. 4255, plan en-

2. The interpretation of the statute in this case by the Second Circuit is in conflict with the construction of the Third Circuit in *Commonwealth & Southern Corporation* v. *Securities & Exchange Commission,* 134 F. (2d) 747 (1943); and with the practice in prior cases.

In the *Commonwealth & Southern* cases, as here, the Commission had issued an order under Section 11 (b) (2) of the Act requiring Commonwealth & Southern Corporation to divest itself of its preferred stock. The order required the corporation to change its capitalization to one class of stock "in appropriate manner, not in contravention of said Act or the rules, regulations and orders promulgated thereunder * * *". The Commission did not, however, seek to avoid a vote of stockholders or enforce the *method* by which the corporation should carry out the order, as it has done here. And when the order was attacked by the corporation, the Commission urged,

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forced without opinion, D. Mass. (1943); *Southern Colorado Power Co.,* Holding Co. Act Release No. 4501, plan enforced without opinion, D. Colo., 1944; *Standard Gas and Electric Co.,* 59 F. Supp. 294 (D. C. Del.), 151 F (2d) 326 (C.C.A. 3rd); *United Light & Power Co.,* 51 F. Supp. 217 (D. Del., 1943), 142 F. (2d) 411, (C.C.A. 3rd, 1944); affirmed under title *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624.

In none of the cases cited by the Commission in its decision was a request made for a vote or a District Court proceeding. The *Commonwealth & Southern* case of 1945 cited here is almost an exact parallel to the present case in that both companies were proceeding under a similar Commission order to reduce their capitalization to one class of stock, both sought the same method of compliance, and both are Delaware corporations. United alone was relieved, however, of the necessity for a Court proceeding, even though its management originally asked for a stockholders vote.

and the court held, that the order was within the Commission's powers under Section 11 (b) *because the order was not self-executing and would have to be enforced under Sections 11 (d) or 11 (e) if the stockholders could not agree on a plan of recapitalization.* In the present case holders of only 45% of the Preference Stock accepted the plan without the approval being sought of the remaining 55% of the Preference Stock and of the 100% of Common Stock affected thereby.

The court's opinion in the *Commonwealth and Southern* case adopted the Commission's views as to its powers under the statute. The court said (134 Fed. 2d 747 at 752):

> "For it is clear that Congress intended that the subject company should be given an opportunity, as is done by this order, to procure the voluntary assent of its stockholders to an appropriate plan or, if it is unable to procure such assent, to propose an appropriate plan to accomplish the result and to secure its enforcement by the district court as against nonassenting stockholders."

In the present case the Commission has done the very thing which it successfully argued in the *Commonwealth and Southern* case it lacked the power to do, *viz.*, to enforce a plan of reorganization without the approval of stockholders or of a court under Sections 11 (d) or 11 (e) of the Act.

The construction of the statute which the Commission and the courts have until now adopted is clearly stated in the *Commonwealth and Southern* opinion:

> "While these orders are final and binding determinations of the result to be achieved it seems clear that Congress intended that the Commission might leave open for later consideration the detailed means by which the result directed should be accomplished.

> It is obvious that in many cases the desired result may be reached in more than one way. Congress evidently intended to permit the Commission to leave to the company involved the initiative in suggesting from among the available alternative methods that one which it deems most appropriate. This seems clear in the light of the fact that under section 11 (e) the company is not restricted to proposing a plan of compliance which it is in a position to carry out itself but it may also propose a plan affecting the rights of third persons which it may, through the Commission, request a court to enforce against the opposition of those third persons. It is only if the company does not propose *a plan which the Commission and the court approve* that the Commission under section 11 (d) itself may propose and seek enforcement of a plan against the opposition of the company." (134 Fed. 2d, at 751.) (Emphasis supplied.)

As in the present case the subject of the Commission's order was a Delaware corporation. At page 25 of its brief in the *Commonwealth & Southern* case the Commission's counsel argued, in answer to the Company's contention that it was unable to carry out the order required of it by the Commission, as follows:

> "If it be fully understood that Section 11 as a whole, of which Section 11 (b) (2) is but a part, is in the nature of a corporate reorganization statute *in which powers not possessed by managements* are to be supplemented or reenforced by the Commission *and the courts,* Commonwealth's arguments all fail." (Emphasis supplied.)

And at page 31 of its brief the Commission therein stated:

> "The purpose of a simple order such as is here involved is to afford the holding company an oppor-

> tunity to work out its own destiny under the Act rather than to impose upon it a ready-made plan. Such an order gives the holding company a chance to achieve compliance through obtaining consents to a plan from its security holders or through submitting a plan to the Commission and to the courts. The order thus avoids prescribing methods and procedure which might appear less desirable to the parties affected than alternative methods or procedure which might be equally proper under the statute."

And the Commission goes on to quote at page 32 of its brief from a report of the National Power Policy Committee which stated:

> " 'Furthermore it seems administratively advisable that every opportunity be offered the owners of holding company securities to work out their own processes of dismantling.' "

And concludes Commission's counsel at page 34 of the Commonwealth brief:

> "Thus Section 11 and the Commission's Order in this case invite Commonwealth and other persons having a bona fide interest to participate actively in the formulation and submission of an acceptable plan. * * * If they do not accept the opportunity, Section 11 (d) permits enforcement of the Order through the means of a plan of reorganization proposed by an interested person or by the Commission, subject to the approval of the Commission and of the District Court."

The Commission's view of the statute prevailed. In the present case the Commission has done the very thing which it contended in the *Commonwealth & Southern* case it lacked the power to do. It has attempted to enforce a reorganization plan without the approval of stockholders

or of a court under Section 11 (d) or (e) of the Act. Nor may it be argued that since acceptance of the Plan of reorganization was voluntary with the Preference Stockholders the Plan was enforceable without a stockholders' vote or a court order as against 100 per cent of the Common Stockholders and the 55 per cent non-assenting Preference stockholders. No such loophole was left by the Commission in its Commonwealth brief, and indeed the theory would be novel in reorganization law. Obviously the Preference stockholders would voluntarily accept any plan that enriched them, regardless of the other stockholders' protests. Reorganization statutes requiring votes and court scrutiny are for the very purpose of obviating such practices. The present plan moreover is also a plan of dissolution, and such plans under Section 39 of the Delaware Corporation Law require the consent of two-thirds in interest of the Stockholders having voting power.

3. This case raises for the first time the issue of how long the SEC may defer according to stockholders the benefits of legislation which Congress enacted more than 10 years ago and which were to be effected "as soon as practicable after January 1, 1938". The admitted unfair distribution of voting power continues unabated into its eighth year despite the explicit direction of Congress to effect a cure promptly, and in the absence of any SEC finding that such a cure would be impracticable. At the hearings on the Plan herein under review the uncontroverted evidence before the Commission showed (R. Part II, pp. 21-22a; and p. 34 of p. 3a):

> (1) The management of The United Corporation had been able to perpetuate itself in office from 1939 through 1944 by requiring that only 25 per cent of

the total voting stock was necessary to make a quorum for the election of directors at annual meetings of the stockholders. Thus, little more than 12½% of the voting stock may control the corporation.

(2) The management had never received the vote of a majority of the voting stock from 1939 through 1944.

(3) At the Annual Meeting in 1943 more than 14,000 stockholders voted in opposition to the management but were unable to seat a single director because the vote was counted non-cumulatively although these stockholders cast more than 21 per cent of the votes cast at the meeting. The management however re-elected 100 per cent of the Directors with a vote of only 39 per cent of the total voting stock outstanding, which vote was cast by 19,000 stockholders. Approximately the same situation was shown to exist at the 1944 Annual Meeting.

This evidence was received by the Commission at the hearings, and Petitioner alleged without challenge that it demonstrated a maldistribution of voting power. To cure this maldistribution Petitioner asked the Commission to impose as conditions to any approval of the Plan (1) that the Company raise its quorum requirement to 50 per cent, (2) institute cumulative voting at annual meetings for election of directors, and (3) grant adequate representation on the board to the stockholders in opposition to the management. Although the Commission recognized the maldistribution of voting power in its decision, it denied Petitioner's requests on the sole ground that they were not "germane" to the issues before it, but added they might be imposed "in a different kind of proceeding" (R. Part II, p. 34 of p. 3a). Petitioner has asked the Commission to inform him what such a proceeding would be, but to date

he has received no enlightenment on that score. The Circuit Court's remarks that Petitioner's amendments appear designed "to secure for petitioner that position in company affairs for which he waged a (losing) proxy battle" overlooks the crucial fact that Petitioner and his more than 14,000 associated stockholders were denied any representation on the board, a denial that could not have been made effective under an equitable system of voting. The proxy contest was waged moreover to secure a majority of the seven man board, while the amendments here sought, if effected, would at most have accorded a minority of two members of the board to Petitioner.

The Plan was filed by the Company under Section 11 (e) of the Act. By so filing the Plan the Company invoked the comprehensive jurisdiction of the Commission, and the Commission had the power to embrace in the proceeding all issues relevant to Section 11 of the Act. This is so because an 11 (e) Plan is subject to modification by the Commission so as to bring it into conformity with the requirements of 11 (b). The failure of the Company to include in the Plan a provision for curing the maldistribution of voting power does not defeat the power of the Commission to modify the Plan so as to include in it amendments to that effect. Any other ruling would limit the jurisdiction of the Commission, and would contravene the Congressional mandate that the Commission effect a cure in maldistribution of voting power "as soon as practicable".

It is indeed surprising that the Commission which was given a mandate to effect this cure as soon as practicable "after January 1, 1938" should be a party to a further delay. In ruling as it did the Commission deprived Petitioner of the benefits of the Act which Congress intended to confer upon the stockholders. The 11 (e) hear-

ing was a proper proceeding for the effectuation of the cure. Furthermore the application of the Company was filed also under Sections 12 (c) and (d) which empowers the Commission to issue orders to prevent the circumvention of the provisions of the Act. Approval of the Plan without imposition of the requested conditions enables the management of United to continue its circumvention of the Act's provisions relating to fair and equitable distribution of voting power. Petitioner was entitled to the benefits of the Act "as soon as practicable". The evidence showing the maldistribution was received at the hearings as germane to the issues; it was undisputed; and the maldistribution is conceded by the language of the Commission's decision. Petitioner has no authority to bring an independent proceeding to effect the cure. It is the Commission's duty to effect a cure as soon as practicable. A hearing has been held on the issue, evidence received, and the Company given ample opportunity to be heard. What is to be gained by requiring the Company to propose a plan for effecting the cure at a second and separate 11 (e) proceeding? Only a delay in time. And such a delay is prohibited by the terms of the Act requiring the Commission to act "as soon as practicable". It is now more than eight years after January 1, 1938. The Commission has not claimed it is impracticable to impose the conditions; only that they are not "germane". This is clearly an error as to the scope of Section 11 (e) and the Commission's powers thereunder.

Respondent United in attempting to rebut this point referred the Circuit Court to a denial by the Commission of petitioner's similar request in a different proceeding. (*In the Matter of The United Corporation,* Holding Co. Act Release No. 5555, (1945)). This omits one vital point. That proceeding was held to determine if United had been

dilatory in complying with the order of August 14, 1943, *which was based on a record closed in 1942.* Petitioner's request for the amendments proposed was based on the evidence of events occurring in 1943 and 1944, and therefore the Commission may have properly exercised its discretion in refusing to adopt the amendments in that proceeding.

Since the closing of the present proceeding, based on a record which includes the happenings of 1943 and 1944, the Commission has abandoned the ground on which it denied the relief sought. That ground was that the amendments were not "germane" to the issues before it in an 11(e) proceeding. Some months later in the *Commonwealth & Southern* case (Holding Co. Act Release No. 5825), the Commission itself incorporated in an 11(e) plan one of the very conditions asked by petitioner and denied, namely institution of cumulative voting (*Id.*, pp. 50-51). And though by this action it in effect admits that it wrongfully denied petitioner the relief sought on this score in the present proceedings, it has not taken any step to amend its orders.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

RANDOLPH PHILLIPS,
Petitioner, Pro Se.

JULIEN CORNELL,
Of Counsel.

April 13, 1946.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1160

RANDOLPH PHILLIPS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND THE UNITED CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 143), affirming two orders of the Securities and Exchange Commission under Section 11 (e) of the Public Utility Holding Company Act of 1935 which authorized and directed The United Corporation to effect a plan for the retirement of a portion of its preferred stock, is reported at 153 F. (2d) 27. The findings and opinion of the Commission (R. 12), dated November 24, 1944, have not yet been officially reported but

are set forth in the Commission's Holding Company Act Release No. 5440.

JURISDICTION

The decree of the Circuit Court of Appeals for the Second Circuit was entered on January 31, 1946 (R. 152). The petition for a writ of certiorari was filed on April 26, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

QUESTIONS INVOLVED

1. It being conceded that the Commission may approve a plan under Section 11 (e) of the Holding Company Act without requiring the proponent company to obtain such stockholders' authorization as is alleged to be required under state law, is that power dependent upon district court enforcement of the plan where the company does not request court enforcement and is in fact able to consummate the plan without court enforcement?

2. Did the court below err in failing to set aside the action of the Commission approving as "fair and equitable" and "necessary" a plan submitted by a holding company under Section 11 (e) which provided for substantial partial compliance with Section 11 (b) and an earlier Commission order

thereunder, after rejection by the Commission of a minority stockholder's request that the Commission condition its approval upon amendments to the plan designed to effect certain immediate changes in voting rights which, by injecting new issues, might well have delayed accomplishment of partial compliance?

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79 *et seq.*), are set forth in the Appendix, *infra*.

STATEMENT

The United Corporation,[1] a Delaware company, is a registered holding company, having outstanding two classes of stock, preference and common (R. 12–13). Petitioner is a common stockholder of United.[2]

On August 14, 1943, the Commission entered an order pursuant to Section 11 (b) requiring

[1] Herein sometimes referred to as "United."

[2] In the administrative proceeding and in the court below petitioner claimed also the right to speak for preference stockholders by reason of having solicited proxies of both common and preference stockholders in connection with the election of directors for United. While the proxy statement expressly stated that the proxy "will not be used to represent you before the Securities and Exchange Commission, nor in any proceeding in any Court" (R. 93), petitioner claims that it was nevertheless contemplated that he would act in his own name to represent the interests of both common and preferred stockholders (Pet. 6).

United to simplify its corporate structure so as to consist of a single class of stock, namely, common, and to cease to be a holding company (R. 12–13, 144). Petitioner did not participate in the proceedings which led to that order and states that he has "at no time" complained thereof (Pet. 7).

Thereafter United filed with the Commission a plan of partial compliance with that order and Section 11 (b) (R. 12–13). The plan, as amended, was approved in the second order of the Commission (R. 61). The plan offered United's preference stockholders in exchange for their holdings a "package" consisting of common stock of Philadelphia Electric Company and cash in an amount sufficient, if completely accepted, to retire approximately 45% of the outstanding preference stock. Complete acceptance would in turn result in the divestment of approximately 38% of United's assets, computed on the basis of current market values including virtually complete divestment of United's holdings in one of its largest subsidiaries, Philadelphia Electric Company (R. 13–15, 37, 147–8; 2).

Hearings were held to determine whether the plan met the statutory requirements of Section 11 (e), namely, whether it was "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan." (R. 2, 9, 13, 110, 150–151). Most of the

voluminous administrative record was directed to an appraisal of whether the "package" would be the equitable equivalent of the rights surrendered.[3] In approving the plan, as amended, the Commission found it fair and equitable (1) to preference stockholders who might accept the offer of exchange, (2) to preference stockholders who might elect not to accept, and (3) to holders of common stock (R. 33–5). Petitioner's objections before the Commission were not specifically addressed to the financial analysis upon which the Commission based its conclusions as to the fairness of the plan. Indeed, he attacked the plan as prejudicial to the interests of both preference and common stockholders and challenged the propriety of considering whether the plan was "fair and equitable" to preference stockholders who might accept the offer[4] (R. 31–3). Petitioner's theory was that since the transactions included in the plan would be subject to Commission authorization under sections of the Act other than Section 11 (e) (for example Sec-

[3] Criticism on the part of members of the Commission's staff of the plan as originally presented was particularly directed to the question whether preference stockholders who might accept the offer would receive sufficient consideration for the preferential claims which they would thereby surrender. Company amendments in response to staff and Commission criticisms increased the attractiveness of the offer from the point of view of preference stockholders.

[4] In the court below petitioner unsuccessfully urged that the subsidiary findings of the Commission were insufficient to support its conclusion as to the fairness of the plan, a point not now pressed (R. 147).

tion 12) the standards set forth in those sections should be applied to the exclusion of the standards of Section 11 (e), and that the proper measure of equivalence of the exchange offer should be the "law of the market place," *i. e.*, the least attractive offering likely to induce exchanges, rather than an appraisal independent of such a market criterion as to whether what was offered under the plan was the equitable equivalent of the rights surrendered.[5] On the other hand, petitioner urged that for purposes of Delaware law the plan involved a dissolution or reorganization requiring submission to stockholders rather than a partial sale of assets and retirement of preferred stock, neither of which required a stockholders' vote. Inasmuch as Section 11 (e) expressly authorizes plans "for the divestment of control, securities, or other assets, or for other action * * * to comply with the provisions of subsection (b)," the Commission concluded that the instant plan was within the scope of Section 11 (e) and subject to the fair and equitable standard therein contained, although it disagreed with petitioner's views as to the applicability of Delaware law.[6]

[5] The current market value of the "package" was in excess of the then market value of United's outstanding preference stock although less than the amount of the liquidation preference of the preference stock. The Commission's measure of equivalence was similar to that considered by this Court in *Otis & Company* v. *Securities and Exchange Commission*, 323 U. S. 624 (R. 33–5).

[6] In charging the Commission with inconsistency (Pet. 11–12) petitioner overlooks the much broader scope of the

The petition for review urged that the Commission orders complained of should be "set aside * * * in their entirety, or [that the court below should] direct their modification as * * * requested" in the petition (R. 5). Petitioner's suggested modification of the approved plan included proposals that:

> (1) It be approved by a vote of the Preference and common stockholders;
>
> (2) acceptance not be optional with the Preference stockholders constituting only 45% or less of the total outstanding Preference stock and * * * each and every Preference stockholder be bound to accept the Plan in equal degree and effect;
>
> (3) cumulative voting be instituted at all elections of directors, a quorum requirement of 50% of the outstanding voting stock be instituted for all meetings of stockholders in place of the present 25% quorum requirement; and * * * adequate representation be granted on the Board of Directors to representatives of the more than 18,000 stockholders who voted at the 1944 Annual Meeting in opposition to the incumbent management; and
>
> (4) a dividend of $3 a share be paid to each of the non-assenting shares of Preference stock upon completion of the Plan (R. 3–4).

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language in Section 11 (e) as compared to the concept of reorganization contained in the Delaware law.

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The Commission entered its approval order on November 29, 1944 (R. 61). The terms of the plan required a fifteen-day period for acceptance of the exchange offer plus additional delay incident to the mechanics of mailing the offer (R. 37). The petition for review was filed on December 4, 1944 (R. 1–5). Immediately upon filing the petition for review petitioner moved for a stay of the orders complained of (R. 10). Argument on the motion for stay was held on December 11, 1944, and included argument on the merits of the plan. At the argument on the stay the Commission in its memorandum took the position that "denial of a stay would be tantamount to denial of further opportunity for review" since it would be impractical to set aside the transaction after acceptance by numerous security holders involved. It was also pointed out that any requirement of a bond to compensate United Corporation for delay would be an impractical burden to impose upon the petitioner, since his potential liability would far outweigh his individual interest in the plan. Accordingly, the Commission stated in its memorandum: "if the Court should conclude that petitioner's objections have substantial basis and cannot be disposed of summarily, then we would agree that a stay would be appropriate."[7]

[7] The Commission summarized its position thus:

"Since denial of a stay foreclosures further opportunity to give petitioner judicial relief for alleged grievances, and

In a decision rendered on December 15, 1944, without opinion, the court below denied a stay. On December 19, 1944, the transactions authorized and directed by the Commission's order were consummated (R. 10). Thereafter the case was briefed and argued on the merits with only oblique references to the problem of mootness.[8]

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since the granting of a stay may prove burdensome to United without possibility of redress, the question of whether or not a stay should be granted necessarily resolves itself into a summary inquiry into the merits of the contention raised by the petitioner. It is our position that petitioner has not made out a substantial basis for setting aside the order complained of. If the Court agrees with our position in this respect we submit that a stay should be denied. If the Court should conclude that petitioner's objections [to the Commission's order] have substantial basis and cannot be disposed of summarily, then we would agree that a stay would be appropriate" (p. 2).

[8] Petitioner apparently recognized the impracticability of setting aside the transactions covered by Commission's order, but stated that the issues were not moot since the directors of United might be liable to the corporation for damages if the Commission's orders, pursuant to which they acted, should be set aside or modified on review. Both the Commission and United Corporation limited their arguments to the issues on the merits, although doubts were expressed as to petitioner's assumption that United's directors would be liable if the order were set aside. See the provision in Section 24 (b) of the Act that—

"The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

See also the last sentence of Section 20 (d) which provides that—

"No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, not-

The opinion of the court below sustained the Commission order on the merits, rejecting all objections urged by petitioner.

ARGUMENT

The decision below is correct and does not warrant further review by this Court. There is no conflict in the circuits. In fact, we are aware of no case in which the arguments now advanced by petitioner have been made. Petitioner's arguments stem from a misapprehension of the scheme of the Act and a misunderstanding of Commission and court decisions which he interprets as inconsistent with the decision of the court below.

1. There was no legal necessity for a vote. Petitioner contends that the action contemplated by the plan would, apart from the Act, require a stockholder vote under Delaware law. This view of Delaware law was disputed by United Corporation and rejected by the Commission (R. 32). But the Commission regarded the issue with respect to state law as irrelevant in view of the overriding requirements of paramount federal law. The court below, while indicating that United's view as to Delaware law was argued "with force" (R. 144), rested its decision exclusively on the absence of any requirements for

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withstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

a vote in Section 11 of the Holding Company Act (R. 145). Petitioner concedes that Section 11 of the Act does not require a vote even where state law would otherwise require a vote upon the transactions proposed in a plan of compliance (Pet. 12, 14). Petitioner nevertheless argues that the only way in which the Holding Company Act may operate to displace such an inconsistent requirement of state law is through a decree of a federal district court in an enforcement proceeding pursuant to Section 11 (e) (or Section 11 (d)).

Petitioner points to no language in the statute which could be so construed. Section 11 (e) permits a company, in anticipation of the compulsions of Sections 11 (b) and (d), to "submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling" the company to comply with Section 11 (b). The Commission, after notice and opportunity for hearing, is authorized to consider whether the plan is "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan," and, if the Commission so finds, "the Commission *shall* make an order approving such plan." Section 11 (e) further provides that where the Commission has approved a plan of compliance "the Commission, *at the request of the company, may* apply to a court, in accordance with the pro-

visions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan." (Italics supplied.) Apart from the seemingly deliberate use of the words "shall" and "may" in different connections in the same sentence, enforcement is clearly conditioned upon the request of the proponent company.

Furthermore, as the circuit court pointed out (R. 146), Section 18 (f), under the provisions of which the Commission would apply for a court order enforcing a Section 11 (e) plan, explicitly states that the Commission "may in its discretion" bring an action in the proper district court.[9]

The United Corporation has not requested the Commission to apply to a federal district court for enforcement of the plan. Under such circumstances there is no need for the Commission to seek enforcement of its order in a court.[10]

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[9] Similarly, against the contingency that a corporation may refuse to comply voluntarily with an order of the Commission under Section 11 (b), Section 11 (d) provides that the Commission may apply to a court for enforcement.

[10] We do not mean to imply that the Commission might not, depending of course upon the nature of the plan, condition its approval upon a request for court enforcement where, for example, an enforcement decree might be necessary to prevent discriminatory treatment as between different security holders of the same class. Petitioner, however, makes absolutely no showing of any necessity for court enforcement to prevent a result contrary to the policy of the statute.

If United and the Commission had been convinced of the substantiality of petitioner's point that a vote would be necessary to authorize the transactions under Delaware law and

The court below effectively disposed of petitioner's contention thus (R. 146–147):

> * * * avoidance of unnecessary court action would suggest that litigation should not be forced upon the Commission and the company when neither finds it necessary, the general provision for review given a person aggrieved [Section 24 (a)] being adequate protection to dissenters. And in the face of the very clearly permissive wording of the statute, we are not disposed to strain for an interpretation of the statute which will force unneeded enforcement proceedings. We do not believe this choice of language can be considered inadvertent; in fact, the general provisions for enforcing compliance with the Act and regulations and orders thereunder, § 18 (f), seems unusually explicit, stating that the Commission 'may in its discretion' bring an action in the proper district court. Here the Commission has not applied for enforcement under (d), nor has United asked for action under (e). Hence the terms of the statute do not apply, and the petitioner's rights are safeguarded by his present petition * * *.

Petitioner expresses a preference for presenting his objections to the plan in a district court

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had anticipated obstructive action in the state courts based upon such a contention, it is entirely possible that enforcement proceedings in a federal district court would have been requested and instituted in order to obtain an injunction from the enforcement court.

enforcement proceeding rather than utilizing the processes of direct review of a Commission order in a circuit court of appeals. Apart from the fact that the statute does not offer the objector such a choice of forums, the reasons given for his preference are without substance. One reason given by petitioner is that the district court enforcement hearing would, he assumes, necessarily precede execution of the plan,[11] while Section 24 (b) leaves it to the discretion of the reviewing courts whether or not to stay a Commission order pending review. It is of course true that one procedure for consummation of a plan may prove more expeditious than another depending upon the nature of the plan involved, but surely an objecting security holder can have no valid objection to allowing the proponent of a plan a choice of procedure so long as either alternative affords dissenters adequate opportunity for judicial review.[12] The problem of exercising dis-

[11] This assumption is not necessarily correct in all cases. It may be that where a plan approved by the Commission, whether or not affirmed on review, has been completely executed, a district court enforcement proceeding would nevertheless be warranted as a means of enjoining collateral attack on the plan.

[12] Where a plan by its terms is to be effective only after approval and enforcement by a district court under Section 11 (e), the consequence is to render inapplicable the procedures for direct review of Commission orders in the circuit court of appeals pursuant to Section 24 (a). *Lownsbury* v. *Securities and Exchange Commission*, 151 F. (2d) 217 (C. C. A. 3), certiorari denied January 2, 1946, No. 601, this

cretion whether or not to stay a plan pending judicial consideration of objections thereto cannot be avoided under either procedure since even where there is an enforcement proceeding objectors will not necessarily be satisfied with a district court ruling as to the fairness of the plan, and may seek to stay consummation of the plan if they appeal from the enforcement order of the district court. Petitioner's contention as to the inadequacy of the opportunity for judicial review under Section 24 (a) is based upon the unsupported assumption that the circuit courts of appeals cannot be trusted to exercise a sound discretion in determining whether to grant or withhold stays as contemplated by Section 24 (b). Petitioner cannot, in any event, point to any abuse of discretion by the court below. While the court below issued no opinion in connection with its denial of a stay, the denial of a stay was after full argument on the merits of petitioner's objections and in the face of affirmative suggestions by the Commission that a stay would be appropriate if the court felt that petitioner had raised any objections not susceptible of summary dis-

Term; *Okin* v. *Securities and Exchange Commission*, 145 F. (2d) 206 (C. C. A. 2), remanded in part on other grounds, 325 U. S. 840. In these cases the dissenting security holders indicated a preference for filing direct petitions for review of the Commission's order in circuit courts of appeal as against voicing their objections in the enforcement court and appealing from any adverse order therein.

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position [13] (see pp. 8–9, *supra*). The subsequent opinion indicates that the court did in fact consider his objections without merit.

Petitioner makes the further claim that a district court enforcement proceeding would be more advantageous to him because it would give him an opportunity to suggest to the district court an alternative plan more to his liking than the plan proposed by the company. This argument is based upon a misapprehension of the scope of Section 11 (e) which provides only that any "registered holding company or any subsidiary company" may submit a plan to the Commission, and that if the Commission shall approve such a plan it may be enforced at the request of the company. Individual security holders have standing of course to be heard before the enforcement court as well as before the Commission for the purpose of voicing their opposition to the company's plan. While it is true that one method of arguing in opposition to the company's plan is to suggest a better one, the ultimate issue before the Commisssion must be whether the company's plan meets the statutory test. The

[13] As partially indicated by the excerpt from the Commission's memorandum in connection with the motion for stay quoted by petitioner (Pet. 11), the Commission urged the Court to treat the proposal as in effect a reorganization. This thought was advanced both with reference to the court's exercise of discretion with respect to the granting of a stay, and also in justification of the Commission's application of the fair and equitable standard of Section 11 (e).

issues which may arise on review are similarly limited whether review takes place in the enforcement court or in a circuit court of appeals. The only question before either court would be whether the Commission's approval of the company-proposed plan is warranted by the record, not whether the court might prefer some alternative suggested by an objecting security holder.[14]

Whatever might be said as an abstract proposition in favor of affording minority security holders the same powers of initiation as are conferred upon the management by Section 11 (e), Congress appears to have deliberately rejected

[14] Contrary to petitioner's contention (Pet. 24) the statute does not call for a hearing *de novo* in the district court enforcement proceeding. The language of Section 11 (e) calls only for a "hearing" by the court, which on familiar principles of administrative law means a review of the Commission's determinations based upon the evidence before it. Cf. *Reconstruction Finance Corporation* v. *Bankers Trust Company*, 318 U. S. 163, 170 in which the court said, with reference to Interstate Commerce Commission approval of reorganization fees, "Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law". The practice under Section 11 (e) has been to proceed on the basis of the administrative record before the Commission. *See Application of Securities and Exchange Commission in re Columbia Oil and Gasoline Corporation*, 50 F. Supp. 965 (D. Del.); *In re Jacksonville Gas Corporation*, (S. D. Fla., 1942, unreported); the subsequent opinion of the court approving the plan is reported at 46 F. Supp. 852).

that course in the hope of expediting compliance.[15] As we have seen (*supra*, pp. 11–13), Section 11 (e) expressly makes court enforcement dependent upon the request of the company and does not give dissenters an election to compel a hearing in a district court. Where they do not have such a hearing they have judicial review as provided in Section 24.

2. Contrary to petitioner's assertions there is presented here no conflict between different circuit courts of appeals. Petitioner's argument of inconsistency between the procedure followed in this case and that followed, or indicated as applicable, in other cases rests simply upon a failure to appreciate the latitude which the statute gives

[15] Cf. *Price* v. *Gurney*, 324 U. S. 100. Section 11 (d), unlike Section 11 (e), does afford an avenue for court enforcement of plans "which shall have been approved by the Commission after opportunity for hearing" and which may have been proposed by the Commission itself or by a person "having a bona fide interest * * * in the reorganization." However, it is in the discretion of the Commission when to abandon hope of achieving compliance with the statute through the Section 11 (e) route of voluntary cooperation with the holding company managements and to invoke the compulsive procedures provided in Section 11 (d). Section 11 (e) became operative in 1936. The Commission was not authorized to institute compulsive proceedings until 1938, did not in fact institute Section 11 (b) proceedings against the major holding company systems until 1940, and has not as yet had occasion in any case to propose its own plan for enforcement under Section 11 (d).

for adapting procedure to the practical requirements of the Commission's administrative task.[16]

The fundamental purpose of Section 11 (e) was, as indicated by the committee reports, to enlist, with appropriate administrative safeguards, the aid of the holding company managements in taking the holding company systems apart. As Congressman Eicher stated:

> If the compulsions of the act are made sufficiently clear to convince the interlocking lawyers of the holding-company bankers that it can't be evaded or compromised, the legal and economic imagination which put these holding-company combinations together will devise many means of taking them apart. [H. Rep. No. 1318, 74th Cong., 1st sess., at p. 50.]

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[16] Petitioner cites various proceedings to establish the proposition that "this is believed to be the first time it [the Commission] has endeavored to effect a plan of reorganization without requiring, *when requested*, a stockholders vote or a District Court proceeding." (Pet. 24n.) Inasmuch as the Commission has never, after approving a plan, refused a proponent company's request to institute a district court enforcement proceeding, the proposition stated by petitioner is completely irrelevant to the questions raised in his petition. If, however, petitioner would have the Court understand that it has been the practice of the Commission to institute enforcement proceedings or to require a stockholders' vote, at the request of a dissenter, there is no case in which any such request has been granted. In fact we are aware of no other case in which a dissenter has urged that a district court proceeding should be had.

As this Court noted in *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 91, the result of the procedures afforded in Section 11 (e) is to give the holding company managements a large measure of control over the timing and initiation of plans of compliance.[17]

The language from the *Commonwealth and Southern* opinion relied on by petitioner also refers to the intention of Congress "to permit the Commission to leave to the company involved the initiative in suggesting from among the available alternative methods that one which it deems most appropriate." See the excerpts from that opinion quoted by petitioner, Pet. 26, 27. With respect to the bearing of that case on the validity of the Commission's order, the court below stated (R. 147): "There is certainly nothing to the contrary, if indeed there is not support, in the general statements in *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission,* 3 Cir., 134 F. 2d 747, 751, so much relied on by petitioner, where the point was not in issue."

Nor is there any administrative inconsistency in approving the instant plan without insisting

[17] This power is, of course, subject to the requirement that the Commission and reviewing courts be satisfied as to the fairness of the plan and to the residual power of the Commission or interested security holders to initiate their own plans in a Section 11 (d) proceeding if the holding company management fails to come forward with plans satisfying the statutory standards. See n. 9, 15, pp. 12, 18, *supra.*

upon compliance with alleged state law requirements as to stockholders' authorization. Company plans proposed under Section 11 (e) have, as anticipated, taken a great variety of forms and have relied upon different mechanics of execution. At a period when a large proportion of the industry was resisting compliance with Section 11 (b) the Commission did not question the propriety of including in some of the earlier Section 11 (e) plans provisions for stockholders' votes. Nevertheless, the dilatory possibilities of such provisions were revealed by experience,[18]

[18] One experience prior to the United plan is worth noting. A plan of dissolution for one company was by its terms dependent upon stockholder authorization pursuant to Delaware law. After a meeting at which the company claimed to have obtained a favorable stockholders' vote, objectors raised technical questions as to the validity of the meeting under state law and also claimed that there had been misrepresentations in oral solicitations in support of the plan. Effort was made to delay enforcement of the plan pending an examination of the numerous stockholders who voted for the plan covering such oral representations. The dilatory possibilities of the inquiry were obviated by a ruling of the court that the voting provision of the plan, being irrelevant to the statutory scheme, need not be insisted upon. The district court entered an order enforcing the plan upon being satisfied that it was "fair and equitable" and "necessary", and declined to rule upon the legality of the vote under state law. See *Application of Securities and Exchange Commission in re Columbia Oil & Gasoline Corporation*, 50 F. Supp. 965 (D. Del.) The same plan had previously been upheld upon review of the Commission's order pursuant to Section 24 (a). See *L. J. Marquis & Co. v. Securities and Exchange Commission*, 134 F. 2d 822 (C. C. A. 3).

and the point of view developed among the staff of the Commission that provisions for submitting a plan to a vote might be provocative of unnecessary delay. In consequence the proposal of such a plan might well raise questions as to the diligence of the holding company management in complying with an outstanding Section 11 (b) order. This point of view was reflected in the preliminary discussions as a result of which United's management was persuaded to eliminate the voting provisions here in question. The supposed administrative inconsistency relied upon by petitioner reflects either varying reactions to different practical problems or shows merely that the Commission has profited from experience.[19] In view of the nature of the problems presented,

[19] In the court below petitioner made much of the fact that although the Commission rejected his arguments for requiring that United's plan be submitted to security holders, it subsequently approved a plan of compliance by the Commonwealth & Southern Corporation which did contemplate a stockholders' vote (not the vote which would be necessary under Delaware law but merely the affirmative authorization of the majority of each class of stock actually represented at a meeting to consider the plan). *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5895 (June 30, 1945). This order, however, was subsequently modified so as to eliminate approval of the provision in the plan with respect to votes, when four months later the plan had not been submitted to the stockholders and the dilatory consequences of the voting provision in the plan had been forcefully brought to the Commission's attention. See *The Commonwealth & Southern Corp.*, Holding Company Act Release No. 6177 (November 1, 1945).

it is unlikely that any helpful clarifications of practice would be afforded by a ruling of this Court upon such essentially administrative considerations.

3. Petitioner asserts as his second ground for certiorari the circuit court's refusal to modify the Commission's order approving the plan by adding certain new conditions which the Commission had previously rejected (Pet. 2, 29–33). The conditions which petitioner proposes be engrafted on the plan would require cumulative voting for directors, raise the quorum requirements for stockholders' meetings, and give "adequate representation" on the board of directors to those opposition stockholders who gave proxies to the petitioner. He asserts that these amendments are necessary to effect a fair and equitable distribution of voting power under Section 11 (b). In answer to this contention we quote below what the Commission stated in its opinion with reference to these proposed amendments:

> We do not disapprove the principles underlying cumulative voting and adequate quorum requirements, but however sound they may be in principle we do not consider the suggestions germane to the issues before us. Possibly in a different kind of proceeding these or similar requirements, if appropriate, might be imposed by our order. In our opinion we would not be warranted in imposing them as conditions to an order upon the present Plan which, as we have already

> noted, contemplates partial effectuation of the provisions of Section 11 (b) but leaves many problems thereunder (including the existing maldistribution of voting power) unsolved." (R. 33.)[20]

Petitioner's argument at this point seems to amount to urging either that the circuit court of appeals should not have permitted the Commission to accept plans of partial compliance, or possibly that the court should have displaced the function of both the administrative agency and the proponent company by rewriting the plan to incorporate the changes favored by petitioner. Either alternative seems to us inconsistent with the statutory scheme.

Petitioner urged in the court below that he had been denied procedural due process because of certain discussions prior to the filing of the plan between the management of United and members of the Commission's staff and/or of the Commission concerning the undesirability from the Commission's point of view of making the plan subject to a stockholders' vote. While the Commission permitted the petitioner to brief and argue his objections to the plan, he claimed that

[20] In this connection the circuit court stated: "His proposals * * * had no bearing on the approval of the present plan; and the Commission was justified in declining to consider them at this time. In fact, they appear designed to secure for petitioner that position in company affairs for which he waged a proxy battle only to lose it at the company's annual meeting." (R. 151.)

the earlier discussions prevented the Commission from considering his objections with an open mind. The court below fully considered and rejected this objection of petitioner's (R. 150–151).

Although petitioner purports to accept this ruling of the court below (Pet. 23) and expressly states that he "does not raise here the question of whether the pre-hearing actions of the Commission deprived him of a fair and impartial hearing on this issue," he devotes a substantial portion of his petition to factual statements and insinuations apparently intended to raise questions on this score. These are presented to the Court as "background." While petitioner expressly disclaimed making an issue of these procedural considerations we do not wish to leave his statement thereon unchallenged.

Answering these objections the court below recognized the necessity for informal conferences such as occurred in this case if "all the intricate details involved in even a simple holding company simplification is to be carried to completion within the time of man" (R. 151). While Commission knowledge of specific differences of viewpoint between the holding company managements and their stockholders would not obviate the necessity for such conferences, it should be noted that in this case petitioner's attempt to show procedural unfairness to him obscures the time sequence of the events related. Thus all of the conversations referred to by petitioner took place prior to the filing of the plan now under review and prior

to petitioner's having entered an appearance in any proceeding in respect to United under the Holding Company Act. Petitioner's only reference to the timing of these conversations in relation to his evincing an interest in the matter is the statement that his objection should have been anticipated because "the Commission knew there had been a proxy fight and that the management's plans would in all likelihood be contested" (Pet. 20–21).

Petitioner conducted proxy fights against the management of United in both 1943 and 1944. Both contests were spirited and resulted in charges and counter-charges. In connection with the 1943 contest the Commission filed a bill in the United States District Court for the District of Delaware charging United's management with violation of its proxy rules.[21] *Securities and Exchange Commission* v. *The United Corporation et al.*, Civil Action No. 298 (1943). After denial of a temporary restraining order by the court the election was held, and the Commission's bill was thereafter dismissed pursuant to a stipulation in which United agreed to adhere in the future to the Commission's interpretation of the proxy rules in question.[22]

[21] The alleged violation included the failure of United's management to make it possible for petitioner's proxy soliciting material to reach the beneficial owners of securities held in "street names," who had been solicited on behalf of the management.

[22] This was after informal check to the satisfaction of the Commission that the alleged violation would not have affected the result.

In connection with the second proxy fight petitioner distributed a letter charging United's management with a gross breach of faith toward its stockholders because its plan as filed contained no provision for a vote of stockholders and because of a prior announcement by United's management that it intended to include a provision for a stockholders' vote in such plans of compliance, then contemplated, as might be filed. Under the circumstances the Commission considered it only fair that United's management be permitted to disclose in a reply statement that the omission of the provision for a vote was in response to suggestions emanating from the Commission. In his brief in the court below and in his petition here petitioner has laid great emphasis upon supposed inconsistencies between this letter of United's management, statements made at the stockholders' meeting when United's President was heckled by petitioner, and a reference to this point in the opinion of the Commission. These differences relate to whether the suggestion in question came from a Commissioner or members of the staff, or both. Any fuzziness of the record on this point is attributable to the fact that while the Commission's trial examiner admitted in evidence the minutes of the stockholders' meeting and the letters, he held that petitioner should not be permitted to conduct an examination for the purpose of exploring prefiling conversations with respect to the plan.

From the Commission's point of view the question is irrelevant. It is a matter of common knowledge that members of the Commission as well as the staff have at all times made themselves available for informal discussions with holding company managements and security holders or their representatives in an effort to facilitate compliance with the Act. As stated in our brief in the court below, "the extent to which such discussions may be limited to the members of the staff, individual Commissioners, or the Commission itself, is largely determined by the amount of time which the Commissioners themselves can afford to devote to preliminary discussions" in view of their manifold responsibilities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Securities and Exchange Commission.
MAY 1946.

APPENDIX

The pertinent provisions of the Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803 (15 U. S. C. 79 *et seq.*), are as follows:

SIMPLIFICATION OF HOLDING COMPANY SYSTEMS

SEC. 11 * * *

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly

and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wher-

ever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof

to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

SEC. 18 * * *

(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which

constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

* * * * *

COURT REVIEW OF ORDERS

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and

thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code,

as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1160

RANDOLPH PHILLIPS

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION and THE UNITED CORPORATION

Respondents.

BRIEF FOR THE RESPONDENT THE UNITED CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM L. RANSOM
Counsel for Respondent
THE UNITED CORPORATION

Dated: New York, N. Y.
May 3, 1946

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General Corporation Law of Delaware
Section 27 10

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1160

RANDOLPH PHILLIPS
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION and THE UNITED CORPORATION
Respondents.

BRIEF FOR THE RESPONDENT THE UNITED CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The United Corporation, a party respondent, opposes the petition herein for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit, dated January 31, 1946 (R. Part IV, XII), affirming orders of the Securities and Exchange Commission, dated November 24, 1944 and November 29, 1944 (R. Part II, 3a, pp. 61-63).

The United Corporation is a Delaware corporation and a registered holding company under the Public Utility Holding Company Act of 1935 (49 Stat. 803-838, 15 U. S. C. A. §§ 79-79z-6). It became a party to the proceeding in the Circuit Court of Appeals by order of that Court dated December 5, 1944 (R. Part I).

NOTE: Italics in quoted matter in this brief are supplied unless otherwise noted. The United Corporation will sometimes be referred to as "the Corporation", the Public Utility Holding Company Act of 1935 as "the Act" and the Securities and Exchange Commission as "the Commission."

Statement of Case

The orders of the Commission dated November 24, 1944 and November 29, 1944 approved a Plan for an exchange of securities filed under Section 11(e) of the Act.

The Plan for Exchange, as finally approved by the Commission and since fully consummated, provided that the Corporation would offer to exchange for each outstanding share of its $3 Cumulative Preference Stock and accrued dividends thereon (up to a total of 1,123,374 shares) 1-8/10 shares of the Common Stock of Philadelphia Electric Company and $6 in cash. The Plan was in no sense compulsory. Holders of the Corporation's Preference Stock were invited to make tenders of their stock as they wished.

The Plan became effective on December 5, 1944, the Circuit Court of Appeals having denied the plaintiff's motion for a stay, and the offer was oversubscribed when it terminated on December 19, 1944.

The Plan was proposed by the Corporation, and was specifically found by the Commission, to be a step in compliance with an earlier order issued by the Commission with respect to the Corporation under Section 11(b)(2) of the Act. That earlier order, dated August 14, 1943, required that the Corporation

> (a) change its existing capitalization to one class of stock, namely, Common Stock; and
>
> (b) take such action, in a manner consistent with the provisions of the Act, as will cause the Corporation to cease to be a holding company.
>
> *In the Matter of The United Corporation*, S. E. C. File Nos. 54-33, 59-25; Holding Company Act Release No. 4478.

As a result of the exchange of securities effected by the Plan, the Corporation reduced the amount of its $3 Cumula-

tive Preference Stock outstanding by approximately forty-five per cent and, by disposing of practically all of the Common Stock of Philadelphia Electric Company which it owned (about 19 per cent of the outstanding voting securities), the Corporation ceased to be a holding company with respect to that large operating utility.* The Corporation, however, continues to have several other statutory subsidiaries, viz. Public Service Corporation of New Jersey, Niagara Hudson Power Corporation, Columbia Gas & Electric Corporation and The United Gas Improvement Company.

Proceedings on the Plan before the Commission

The Findings, Opinion and Order of the Commission approving the Plan (R. Part II, 3a, pp. 13-63) were based upon the record of a number of hearings held before it, in which the petitioner, among others, participated. Moreover, all of the petitioner's objections to the Plan were briefed and argued by him before the full Commission before final orders approving the Plan were entered.

Proceedings in the Circuit Court of Appeals

Subsequent to the issuance of the Commission's order of November 29, 1944 approving the Corporation's Plan, Phillips filed, pursuant to Section 24(a) of the Act, his petition to review in the United States Circuit Court of Appeals for the Second Circuit, and made a motion before that Court for a stay of the order pending review. The motion for a stay was denied by an order of the Court entered on December 15, 1944. Thereupon, the Corporation proceeded to carry out the Plan as required by the Commission's order.

Argument on the petition to review was held almost a year later, on December 4, 1945, and briefs were submitted

* Subsequently, a second Plan for the exchange of Common Stock of Delaware Power & Light Company and cash, was approved and consummated. Phillips has also petitioned to review the orders of the Commission approving the second Plan (*Phillips* v. *Securities and Exchange Commission*, U. S. C. C. A., 2d.; No. 20051).

by all parties to the proceeding. On January 7, 1946 the Court (per Clark, J.) rendered its opinion unanimously affirming the orders of the Commission (R. Part IV, I), and on January 31, 1946 the Court entered the decree thereon which is the subject of this petition for a writ of certiorari (R. Part IV, XII).

Status of Petitioner

The petitioner claims to be the beneficial owner of 1,100 shares of the Corporation's Common Stock, which are registered in the name of his brother (R. Part III, p. 21). While he states that he is the "attorney-in-fact" for other stockholders of the Corporation (Pet. p. 6), this claim is based only upon proxies received by him from certain stockholders in connection with his unsuccessful "proxy contest" at the Corporation's annual meeting in 1944. The proxy statement sent out by him at that time expressly provided, however, that the proxy would not be used to represent the stockholders "before the Securities and Exchange Commission, nor in any proceeding in any Court" (R. Part II(2), p. 32a).

In fact, therefore, the petitioner had standing only to register his own views as to the Corporation's Plan and the Commission's orders approving the Plan.

Phillips' petition to review the orders approving the Plan asked that these orders be set aside in their entirety or, if not set aside, modified so as to impose upon the Plan certain conditions which would require the Corporation to change present provisions for a quorum at stockholders' meetings, to grant cumulative voting privileges to voting stockholders, and to place on its Board of Directors someone to "represent" those stockholders who gave proxies to the petitioner at the Corporation's annual meeting in 1944. In other words, the petitioner was at all times willing to accept the Plan *provided* the Court would engraft upon the

Plan certain conditions, which he sought on matters in which he had a controversial interest and which were irrelevant to the substance of the Plan.

The Circuit Court of Appeals found that the petitioner had received a fair and full hearing before the Commission, holding that the conferences between representatives of the Corporation and the Commission, which were the basis for the petitioner's protestations before that Court that he had been denied a full hearing, were nothing more "than legitimate prehearing conferences, of the kind which the Commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man" (R. Part IV, I). Since the petitioner states that he does not raise, on this petition for a writ of certiorari, any question as to whether he was deprived of a fair hearing by the Commission (Pet. p. 23), it seems to us that the "background" he seeks to create in his brief is beside the point.

Summary of Argument

In answer to the contentions set forth in the petitioner's brief, we submit the following:

1. There was no requirement under the Act, either express or implied, that the Corporation's Plan be submitted to a District Court for enforcement.

2. No conflict exists between the decision of the Circuit Court of Appeals in the instant case and the decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. (2d) 747 (1943).

3. Stockholder approval of the Corporation's Plan was not required by Delaware law.

4. The Commission was fully justified in refusing to engraft upon the Plan the extraneous conditions desired by the petitioner.

POINT I

There was no requirement under the Act, either express or implied, that the Plan be submitted to a District Court for enforcement.

The gist of the petitioner's argument is that the Circuit Court of Appeals erred in not holding that the Corporation's Plan should have been made subject by the Commission, to either a vote of the stockholders of the Corporation or an enforcement proceeding in a United States District Court. In this petition for review, he presses the point that, having approved the plan without provision for a vote of stockholders, the Commission was *required* by the Act to resort to an enforcement proceeding. The immediate answer to this argument is that the Act imposes no such requirement.

Section 11(b)(2) of the Act makes it the duty of the Commission to require, after notice and hearing, that a registered holding company take such steps as the Commission may prescribe to cure unnecessary complications in the system structure and any inequitable distribution of voting power among security holders, and to cease to be a holding company with respect to subsidiaries which themselves have holding companies as subsidiaries. As noted, The United Corporation's Plan was a step in compliance with an order of the Commission issued under Section 11(b)(2) requiring the Corporation to recapitalize to a single class of stock and to cease to be a holding company.

Sections 11(d) and 11(e) provide alternative methods for insuring compliance with an order issued under Section 11(b)(2).

Section 11(d), which may be invoked if a company may refuse to comply voluntarily with an order of the Commission entered under Section 11(b)(2), provides that "the Commission *may* apply" to a District Court for an enforcement order.

Section 11(e), under which The United Corporation's Plan was filed, permits a company to submit to the Commission a plan of its own choice to enable the company to effect compliance with Section 11(b)(2), and requires the Commission to issue an order approving the plan, if the Commission finds the plan necessary to effectuate the provisions of subsection (b)(2) and fair and equitable to persons affected thereby. Subsection (e) further provides that, after the Commission has approved such a plan, "the Commission at the request of the company *may* apply" to a District Court for an order enforcing and carrying out the plan.

As the Court of Appeals found, the wording of these provisions of the statute is "very clearly permissive", and does not create the mandatory direction upon which the petitioner's argument is based.

Because it appears from the face of the statute that the requirement urged by the petitioner does not exist, he has been compelled to argue, in effect, that the statute must contain, at least implicitly, a provision for District Court enforcement in order that the rights of possible dissenters may be protected. Such an argument, however, ignores the fact that such protection, as may be needed, is provided in another section of the Act. Section 24(a) gives to persons aggrieved by an order of the Commission the right of review by direct petition to the proper Circuit Court of Appeals, a right fully exercised by this petitioner in the instant case.

The mandatory requirement for enforcement proceedings, as argued by the petitioner, is rendered absurd when considered in the light of the present proceedings.

Certainly enforcement proceedings under Section 11(d) as to the Commission's basic Section 11(b)(2) order of August 14, 1943 were not required, since the Corporation had undertaken to comply with that order. Enforcement proceedings with respect to the Section 11(e) Plan for an

exchange of securities would likewise have been ridiculous, since the Plan was *voluntary*—and the District Court would have had nothing to enforce.

The decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. (2d) 747 (1943) is not in conflict with the decision of the Circuit Court in the instant case

In an attempt to establish a conflict of authority as support of his petition, the petitioner contends that the decision of the Circuit Court of Appeals for the Third Circuit in the *Commonwealth & Southern* case is contrary to the decision of the Circuit Court in the present case. It seems to be the petitioner's view that in the *Commonwealth & Southern* case, the Court held that, where the action to be taken under a Section 11(e) plan would be subject, under State law, to approval by stockholders, the Commission's order under the act must provide for either such stockholder approval or enforcement proceedings in a District Court.

The Circuit Court, in affirming the Commission's orders in the present case, rejected the petitioner's interpretation of the decision in the *Commonwealth & Southern* case. Indeed, it found that decision to be wholly consistent with the procedure affirmed in the present case.

It is to be noted that the *Commonwealth & Southern* case involved no concrete plan for compliance with a Section 11(b)(2) order of the Commission. Rather, the Court had before it an attack upon the Commission's power to issue a so-called "blanket" recapitalization order under Section 11(b)(2) and a challenge of the validity of the Act as invoked by the Commission. The Court held that the Commission's order was explicitly authorized by Section 11(b)(2) and that the Section was constitutional.

To support its contention that Section 11(b)(2) did not warrant the recapitalization order, the Company in that case claimed that it did not have the power to effect a mandatory recapitalization of its Preferred and Common Stocks. The Court held, however, that the Act itself provided Commonwealth & Southern with the power to effect the required recapitalization, pointing out the various methods under the Act for carrying out a Section 11(b)(2) order of the Commission.

The first method noted by the Court—and clearly the preferable method—was precisely the method adopted by The United Corporation for effectuating its Plan in the present case. The Court stated (p. 751):

> "The first of these methods is through a plan voluntarily submitted by the company under subsection (e) of section 11 and approved by the Commission. *If the plan is one which can be carried out by the sole action of the parties thereto no further proceedings are needed.* * * *"

The United Corporation's Plan was voluntarily submitted under subsection (e) of Section 11. It contained no provision for "further proceedings" since such further proceedings were not needed to carry out the *voluntary* exchange transactions provided for in the Plan.

The excerpts from the opinion of the Circuit Court in the *Commonwealth & Southern* case which the petitioner has selected to use in his brief have no possible relevancy to any issue before the Court on this petition for a writ of certiorari. They deal with the Commission's power under Section 11(d) of the Act to seek enforcement, *against the opposition of a company*, of a plan for compliance with an order issued under Section 11(b)(2), and with the *right of a company* to request the Commission, pursuant to Section 11(e), to apply to a District Court for enforcement of a mandatory recapitalization plan.

Rather, as indicated above, and as the Circuit Court in the present case explicitly observed, the *Commonwealth & Southern* case affirmatively approves the procedure followed by The United Corporation in effecting its Plan.

The Petitioner's misapprehension of the requirements of the General Corporation Law of Delaware

Underlying the petitioner's argument is his misapprehension that the approval by the stockholders of The United Corporation of the Plan for an exchange of securities was required under provisions of the Delaware law

The Circuit Court of Appeals noted the force of the Corporation's view, that no such stockholder approval was required under the laws of the state of incorporation, but held that the point was immaterial, since the federal statute had an overriding effect.

It may be noted, however, that, as against the petitioner's attempt to characterize the exchange Plan as a "reorganization" and "dissolution" of the Corporation under Delaware law, it was, in effect, nothing more than a method for purchasing the Corporation's Preference Stock. Section 27 of the Delaware Law authorizes such a purchase by action of the Board of Directors alone.

POINT II

The Commission was justified in refusing to engraft upon the Plan the extraneous conditions desired by the petitioner.

As previously noted, the petitioner was at all times willing to accept the Corporation's Plan, despite his claims as to the Plan's invalidity, provided the Commission or the Court would engraft upon it certain conditions which would

require the Corporation to change existing quorum provisions for stockholders' meetings, to grant cumulative voting privileges, and to place on its Board of Directors someone who would "represent" the stockholders who gave proxies to the petitioner at the Corporation's annual meeting in 1944.

The petitioner's pretext for attempting to force upon the Corporation and the Commission his desire to participate in the management of the Corporation is that these conditions, if imposed, would cure a claimed "maldistribution" of voting power within the Corporation.

It is, however, obvious that the conditions sought by the petitioner are quite unrelated to a proposal to eliminate shares of Preference Stock through a voluntary exchange of securities, and would have no effect whatsoever upon the distribution of voting power between the Corporation's Common Stock and the remaining shares of Preference Stock.

In a different proceeding with respect to the Corporation, where the Commission approved, pursuant to Section 11(c), a one year extension of time for compliance with the order of August 14, 1943, the Commission refused this petitioner's request that these same conditions be then imposed and, in its opinion, made it unmistakably clear that the conditions were totally unrelated to the order of August 14, 1943. *In the Matter of The United Corporation,* S. E. C. File No. 59-25; Holding Company Act Release No. 5555.

The Commission's opinion stated, in part:

> "Most of the conditions requested by the objecting stockholders pertain to representation on the Board of Directors, through provisions for cumulative voting or otherwise, of preference and common stockholders who are opposing the present management. * * * Our order directing the company to change its capitalization to one class of stock was designed, among other things, to eliminate the in-

> equitable distribution of voting power between the holders of the common and preference stocks. The proposed conditions seeking representation for opposition stockholders would have no remedial effect on this disproportion of voting power between the two classes, and would thus not be a step in compliance with our order."

It must be concluded, therefore, as the Circuit Court of Appeals observed, that the petitioner's present attempt to impose these conditions is calculated only "to secure for petitioner that position in Company affairs for which he waged a proxy battle only to lose it at the Company's annual meeting" (R. Part IV, I).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted

William L. Ransom
Counsel for Respondent
The United Corporation

Dated: New York, N. Y.
May 3, 1946